(6)

No. 90-1038

In The

# Supreme Court of the United States

October Term, 1990

THOMAS CIPOLLONE, individually and as Executor of the Estate of Rose D. Cipollone,

*Petitioner,*

v.

LIGGETT GROUP, INC., a Delaware Corporation; PHILIP MORRIS INCORPORATED, a Virginia Corporation; and LOEW'S THEATRES, INC., a New York Corporation,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit**

## BRIEF FOR PETITIONER

MARC Z. EDELL
*Counsel of Record*
BUDD LARNER GROSS ROSENBAUM GREENBERG & SADE, P.C.
*Attorneys for Petitioner*
150 John F. Kennedy Parkway
CN 1000
Short Hills, New Jersey 07078
(201) 379-4800

ALAN M. DARNELL
*Of Counsel*
WILENTZ, GOLDMAN & SPITZER, P.C.
*Attorneys for Petitioner*
90 Woodbridge Center Drive
P.O. Box 10
Woodbridge,
New Jersey 07095-9811
(908) 636-8000

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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## QUESTIONS PRESENTED

1. Does the Federal Cigarette Labeling and Advertising Act, which requires warning labels on cigarette packages, preempt state law tort claims premised on cigarette manufacturers' failure to warn consumers regarding the nature and extent of the health hazards of smoking?

2. Does the Federal Cigarette Labeling and Advertising Act preempt state law intentional tort claims premised on the cigarette manufacturers' intentional deception of consumers regarding the nature and extent of the health hazards of smoking?

## PARTIES

The parties appearing in the United States Court of Appeals for the Third Circuit were Antonio Cipollone, individually and as executor of the estate of Rose D. Cipollone, appellee/cross-appellant below, and three cigarette manufacturers: Liggett Group, Inc. (formerly Liggett & Myers), Philip Morris, Inc., and Loew's Theatres, Inc. (formerly Lorillard), appellants/cross-appellees below.

The petitioner herein, Thomas Cipollone, is the executor of the estate of Rose D. Cipollone and the individual to be substituted as the administrator of the estate of Antonio Cipollone. The respondents are Liggett Group, Inc., Philip Morris, Inc. and Loew's Theatres, Inc.



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## OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit is reported at 893 F.2d 541 (3d Cir. 1990), and reproduced at Petitioner's Appendix ("Pet. App.") at 1a-93a. A prior opinion of the Court of Appeals, which decided the question of preemption on a certified interlocutory appeal, Pet. App. at 109a-162a, is reported at 789 F.2d 181 (3d Cir. 1986), *cert. denied*, 479 U.S. 1043 (1987). The District Court's original preemption opinion, Pet. App. 109a-162a, is reported at 593 F. Supp. 1146 (D.N.J. 1984).

## JURISDICTION

The Court of Appeals denied plaintiff's timely petition for rehearing *en banc* on August 30, 1990. On November 21, 1990, this Court granted petitioner until December 28, 1990 to file a Petition for Writ of Certiorari. Pet. App. 163a. A Petition for Writ of Certiorari was granted on March 25, 1991. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTE INVOLVED

The federal law in question is the Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, 79 Stat. 282, (hereafter the "Act" or "Labeling Act"), codified as amended at 15 U.S.C. §§ 1331-1340 (1982 & Supp. 1984). As enacted by Congress, the Labeling Act required cigarette manufacturers to place the following warning on cigarette packages beginning on January 1, 1966: *"Caution: Cigarette Smoking May be Hazardous to Your Health."*[1] In 1970, Congress amended the warning to: *"Warning: The*

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[1] Pub. L. No. 89-92, 79 Stat. 282, *reprinted in* 1965 U.S. Code Cong. & Admin. News 300.

*Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health."*[2]

The Labeling Act's preamble sets forth the following statement of policy and purpose:

DECLARATION OF POLICY

> Sec. 2. It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby –
>
> (1) the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and
>
> (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, non-uniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.[3]

The original Labeling Act also included the following preemption section:

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[2] Pub. L. No. 91-222, 84 Stat. 87, *reprinted in* 1970 U.S. Code Cong. & Admin. News 93. Congress changed the warning requirement again in 1984, Pub. L. No. 98-474, 89 Stat. 2200, but those requirements are not implicated here as Rose Cipollone's lung cancer was diagnosed in 1981. Her claims against defendants are restricted to 1981 and before.

[3] Pub. L. No. 89-92, 79 Stat. 282, *reprinted in* 1965 U.S. Code Cong. & Admin. News 300. These provisions were not changed by the 1970 amendment to the Act.



PREEMPTION

> Section 5. (a) No statement relating to smoking and health, other than the statement required by section 4 of this Act, shall be required on any cigarette package.
>
> (b) No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

Pub. L. No. 89-92, 79 Stat. 282.[4] The preemption provision was amended in 1970 as follows:

> (b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

Pub. L. No. 91-222, 84 Stat. 87 (subsection 5(a) remained unchanged).

The Act contains no provision addressing state law tort claims. It provides no compensation scheme for individuals injured by smoking.

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[4] The preemption section also required the Federal Trade Commission ("FTC") to submit periodic reports to Congress on the effectiveness of cigarette labeling, advertising, and promotion. It required the Secretary of Health, Education and Welfare to transmit periodic reports to Congress on the health consequences of smoking and the need for legislation. The section recognized that the Act did not limit the FTC's authority with respect to unfair practices in the advertising of cigarettes and did not affirm nor deny the FTC's holding that it was authorized to require an affirmative statement in cigarette advertising. *Id.*

## STATEMENT OF THE CASE

### A. Proceedings Below

Rose Cipollone and her husband Antonio filed this product liability action seeking damages for injuries suffered as a result of Rose's lifetime of cigarette smoking on August 1, 1983, in the United States District Court for the District of New Jersey.[5] Respondents manufactured the cigarettes Rose Cipollone smoked.

In her complaint, Rose Cipollone alleged that defendants failed to inform consumers adequately of the health risks of smoking, intentionally neutralized the effect of the Congressionally-mandated health warnings through their advertising and public relations campaigns, knowingly misrepresented the health hazards of smoking, and ignored and withheld from the public medical and scientific evidence of the dangers of smoking. Joint Appendix ("J.A.") at 81.

In their answers to the complaint, defendants raised the Labeling Act's preemption provision as an affirmative defense to all plaintiff's post-1965 (post-Labeling Act) claims. Petitioner's Appendix ("Pet. App.") at 113a. Plaintiff moved to strike the preemption defense. *Id.* The district court ruled that the Act did not expressly or impliedly preempt any of Mrs. Cipollone's claims. *Id.* at 160a-161a. The district court certified its preemption decision for interlocutory appeal and the Court of Appeals for the Third Circuit agreed to hear it. *Id.* at 96a.

The Court of Appeals agreed with the district court's conclusion that the Labeling Act's preemption provision did not expressly preempt Mrs. Cipollone's common law tort claims. *Id.* at 102a. The Court of Appeals also agreed that Congress did not entirely "occupy the field" of smoking and health so as to preempt her claims. *Id.* at

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[5] After Rose's death in 1984, the third amended complaint was filed to include a wrongful death claim by her husband. J.A. 81. Subsequent to the trial in this matter, Antonio Cipollone died. Their son, Thomas, now prosecutes this case.



104a. However, the court concluded that Mrs. Cipollone's state law tort claims were preempted because they presented an "actual conflict" with the Act. *Id.* at 106a. It held that, though it was not impossible to comply with both the federal law and to pay damages, Mrs. Cipollone's common law tort claims frustrated the purpose of the Act. Therefore, it preempted "those state law damage actions relating to smoking and health that challenge either the adequacy of the warning on cigarette packages or the propriety of a party's actions with respect to the advertising and promotion of cigarettes." *Id.* On remand, the trial court interpreted the Court of Appeals' decision as barring Mrs. Cipollone's post-1965 claims for failure to warn, fraudulent misrepresentation, express warranty, and conspiracy to defraud. 649 F. Supp. 664, 675 (1986).

Following a four-month trial, the jury returned a verdict of $400,000 on Mrs. Cipollone's pre-1966 express warranty claim against Liggett, the manufacturer of the cigarettes she smoked during that period. Pet. App. 3a. The jury also concluded that: Liggett had a duty to warn of the hazards of smoking prior to 1966; Liggett failed to fulfill that duty; and its failure to warn proximately caused Rose Cipollone's lung cancer and death. *See id.* Nevertheless, the jury returned a verdict in Liggett's favor on the failure to warn claim because of its findings on comparative fault. *Id.*

Both sides appealed. The Court of Appeals set aside the verdict and ordered a new trial on certain issues, finding error in the jury instruction on the express warranty claim. *Id.* at 5a. The court recognized the problems engendered by its interlocutory preemption decision, which had created an artificial time constraint on the determination of both causation and liability, and concluded that the "skewed" effect of its ruling warranted a reversal of the jury's comparative fault finding. *Id.* Despite these observations, the panel was compelled to reaffirm the prior interlocutory preemption decision

because of the Third Circuit's internal operating procedures. *Id.* at 88a, n.51. The court also held the preemption bar applied to Mrs. Cipollone's intentional tort claims. The court reasoned such claims would " 'challenge . . . the propriety' of [defendants'] 'actions with respect to the advertising and promotion of cigarettes,' " within the meaning of the earlier preemption opinion. *Id.* at 90a.

Chief Judge Gibbons joined the preemption portion of the opinion only because he felt bound by the prior panel's decision. In a concurring opinion, he concluded that the court's original preemption decision was wrong as a matter of law. *Id.* at 92a-93a.

### B. Rose Cipollone's Lifetime of Smoking

Rose DeFrancesco Cipollone was born in 1925 in Queens, New York, the daughter of Italian immigrants. 683 F. Supp. 1487, 1489 (D.N.J. 1988).[6] Growing up, she went to the movies and idolized the female movie stars, glamorous with their long gowns and cigarettes. She enjoyed "dressing up" like those movie stars, and kept scrapbooks of their pictures, which she snipped from cigarette advertisements. *Id.*; Pet. App. 6a.

Rose began to smoke in 1942, at age 16, imagining herself as part of the sophisticated scenes depicted in cigarette advertisements. It was a "cool, glamorous and grown-up" thing to do. 683 F. Supp. at 1489. She chose Chesterfield cigarettes, made by Liggett & Myers, because she was attracted by the advertisements of movie

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[6] The facts contained in this section derive primarily from the trial court's findings of fact on motion for a directed verdict, 683 F. Supp. 1487 (1988), which are restated, in large part, by the Court of Appeals at 893 F.2d 571 (1990) (Pet. App. 1a-93a). The only testimony of Rose Cipollone available to the jury was her deposition, taken by defendants over the course of four days in 1984 when Mrs. Cipollone was dying of lung cancer.



stars and pretty girls smoking Chesterfields, and because the ads stated that the cigarettes were mild, which she understood to mean "safe." *Id.*; Pet. App. 6a. The ads made a lasting impression. Forty years later, she still remembered they claimed Chesterfields "were for ladies." *See* Pet. App. 7a. By the end of 1943, she was smoking a pack of Chesterfields a day.

Rose read magazines avidly and listened to the radio frequently during these years. *Id.* She especially loved Arthur Godfrey's radio show, which was fully sponsored by Liggett & Myers. *Id.* During the course of these shows, Godfrey endorsed Chesterfield cigarettes in accordance with then current Liggett & Myers' advertising and promotional material. For example, when concerns about the possible relationship between cigarette smoking and lung cancer first appeared in the popular press in 1952, Godfrey responded to these claims for Liggett:

> You hear stuff all the time about cigarettes are harmful to you . . . .
>
> Here's an ad. You've seen it in the papers – If you smoke, it will make you feel better . . .
>
> "Nose, throat and accessory organs not adversely affected. First such report ever published about any cigarette . . . . The medical specialist, after a thorough examination of every member of the group stated, 'it is my opinion that the ears, nose, throat and accessory organs of all particular subjects examined by me were not adversely affected in the six-month period by smoking Chesterfield cigarettes provided." Now that ought to make you feel better if you've had any worries at all about it. I never did. I smoke two or three packs of these things every day. I feel pretty good. I don't know, I never did believe they did you any harm and now we – we've got the proof. So Chesterfields are the

> cigarettes for you to smoke, be they regular size or king size.

Pl. Ex. 2305; Trial Record ("R.") 2349.[7]

Motivated by her desire to smoke a "safe" cigarette, Rose switched in 1955 to the "miracle tip" filter in L&M cigarettes, also manufactured by Liggett. J.A. 131. The L&M ads led her to believe that nicotine and other "bad stuff" would be trapped in the filter. *Id.* She recalled seeing L&M ads that said "doctors recommend you smoke filter cigarettes . . . . I know that through advertising, I was led to assume that they were safe and they wouldn't harm me." J.A. 153. And, in fact, the ads proclaimed, "L&M filters are just what the doctor ordered." 683 F. Supp. at 1490. Many of the ads featured a letter from Dr. Darkis, the Director of Research at Liggett, warranting that the filter used in L&M cigarettes was "entirely harmless to health." Pl. Ex. 2375B; R. 7448.

After the Surgeon General's Report on Smoking and Health was issued in 1964,[8] reports linking smoking with cancer and heart disease began appearing on television and radio. Rose Cipollone did not believe those reports. In her own words, "the government was there and there was no real proof. Tobacco companies wouldn't do anything that was going to kill you so I figured, ah, until they proved it to me to be real, I didn't take it seriously." J.A. 133. Although Rose Cipollone was concerned about her health, she was "sure that if there was anything that dangerous, that the tobacco people wouldn't allow it and the government wouldn't let them do that." J.A. 146. She

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[7] Chesterfield magazine ads in the 1950's featured similar copy – *"PLAY SAFE, Smoke Chesterfield. . . ."* and *"Nose, Throat and Accessory Organs not Adversely Affected by Chesterfield. . . ."* J.A. 9-10.

[8] *Smoking and Health, Report of the Advisory Committee to the Surgeon General of the Public Health Service*, U.S. Dept. of Health, Education and Welfare (Jan. 11, 1964) (hereafter "1964 Surgeon General's Report").



found support for her belief in the tobacco companies' frequent public statements during this period, which reassured her it had not been proven that cigarette smoking caused lung cancer. Pet. App. 16a.

Impressed by the images of glamorous, liberated women in the Virginia Slims advertisements, Rose switched to Virginia Slims in 1968. *Id.* at 14a She later switched to Parliaments, because she thought they were safer. *Id.* at 15a. The brand was heavily advertised as lower in tar and nicotine with a recessed filter. The ads led her to believe that if the cigarette company could recess the filter and it would not touch her lips, it was better for her. *Id.* at 15a. In 1974, she switched to True because her family physician recommended them with the admonition "if you are going to smoke, smoke these." She also saw the True ads indicating they were lower in tar and nicotine, and that reinforced her view that they were safe or at least safer. 683 F. Supp. at 1490.[9]

In 1981, Rose Cipollone was diagnosed with lung cancer. She tried unsuccessfully to stop smoking. Even after her lung was removed in 1982, she continued to sneak cigarettes. She died on October 21, 1984.

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[9] As Rose Cipollone testified, the industry's affirmations directly influenced her, like millions of smokers, to switch to low tar cigarettes that the manufacturers had led her to believe were "milder" and "safer." J.A. 131; 153. The Federal Trade Commission, charged by Congress with the task of reporting on the effectiveness of the warning label, concluded in its first report in 1967:

> [M]any smokers would like to give up the habit, but don't and won't. Some of them have switched to brands that they believe, often erroneously, to be less hazardous . . . . [M]illions of smokers will continue to be deceived by false claims of "mildness" and misleading portrayals of filters.

Federal Trade Commission Report to Congress Pursuant to the Federal Cigarette Labeling and Advertising Act, June 30, 1967 (hereafter "1967 FTC Report"), at 28.

## C. Cigarette Manufacturers' Efforts to Negate Federal Warning

To appreciate why Rose Cipollone believed what she did about smoking and why she continued to smoke after the federally-mandated warning appeared, her conduct must be seen in the light of the cigarette manufacturers' activities during the same period – much of which was kept from the jury because of the preemption ruling. The only post-1965 internal corporate documents the jury was permitted to consider were those related to pre-1966 activities or the credibility of defendants' witnesses. *See* Pet. App. 4a. Thus, as a direct result of the preemption ruling, the jury heard evidence on both sides of the story until January 1, 1966 (and returned a verdict in the Cipollones' favor based on that evidence), but only heard evidence from the cigarette manufacturers' perspective thereafter. The jury saw only that the warning label was in place and that in the face of it, Rose Cipollone continued to smoke. Evidence of the defendants' sophisticated efforts to undermine the effectiveness of that warning was excluded because of the preemption ruling.

In 1954, faced with the first reports in the popular press linking cigarette smoking and lung cancer, the cigarette industry laid the groundwork for what would later become its response to the federal health warning. At that time, the industry's public relations firm engineered the creation of the Tobacco Industry Research Committee (later renamed the Council for Tobacco Research ("CTR")), a purportedly independent research organization funded by the tobacco industry. The industry promoted the CTR in full page ads in newspapers across the country as its "good faith effort to search for the truth, learn the risk of smoking, and report the findings to the general public." 683 F. Supp. at 1491. However, the defendants' internal documents reflect that CTR was actually created to reassure the public of "the existence of weighty



scientific views which hold that there is no proof that cigarette smoking is a cause of lung cancer." J.A. 13.[10] As one of the defendants' chief executive officers confessed, "CTR is [the] best & cheapest insurance the tobacco industry can buy and without it the Industry would have to invent CTR or would be dead." J.A. 74. Indeed, the organization's scientific veneer was used by the industry to issue public statements countering adverse publicity on smoking and health – including the warnings mandated by Congress. CTR's Scientific Director, Dr. Clarence Cook Little, is quoted in numerous articles espousing the industry's view that no proof existed that smoking caused lung cancer.[11]

In 1970 the industry published CTR-funded research conclusions in major newspapers with a full page advertisement entitled, "After millions of dollars and over 20 years of research: The question about smoking and health is still a question." They reported the results of their "dedicated effort to explore the question of smoking and health" as follows: "So far, in spite of this massive [CTR research] effort, there are eminent scientists who question whether any causal relationship has been proved between

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[10] Attached hereto is an Appendix identifying certain of defendants' employees, trade associations, public relations counsel, and advertising concerns. This appendix is provided to assist the Court in its review of the documents contained in the Joint Appendix.

[11] For example, Dr. Little was quoted in *The New York Times* in 1962 as saying: "Much research reported in the past few years has tended to weaken, rather than to support, the hypothesis that cigarette smoking is a causative factor in lung cancer." Pl. Ex. 9358, R. 12088. *See also* Pl. Ex. 9350, Pl. Ex. 9330 Pl. Ex. 9304, and R. 12088, for other representative statements.

cigarette smoking and human disease – including lung cancer, coronary heart disease, or emphysema." J.A. 42.

The industry publicly challenged all adverse medical and scientific evidence regarding smoking, irrespective of its truth or validity. The strategy of undermining the scientific community's claims was formulated even before the scientific evidence became public. The industry had determined that it would attack reports demonstrating the dangers of cigarette smoking and assail the qualifications of the researchers, as necessary. *See* J.A. 70.

Moreover, the industry advertised its products in order to neutralize the effect of the federally-mandated health warning,[12] and it issued statements denying any link between smoking and lung cancer. J.A. 23, 76. Rose Cipollone believed the press statements and public relations materials issued by the tobacco companies and their trade association denying this causal "link." J.A. 144. She credited news articles ghost-written by cigarette company employees, claiming that the cigarette-cancer link was "bunk."[13]

This represents but a small fraction of the evidence reflecting the cigarette industry's post-1965 efforts to neutralize the government's undertaking to apprise the public of the health hazards of cigarette smoking, and the

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[12] The FTC concluded in 1967 that

> the warning label on cigarette packages has not succeeded in overcoming the prevalent attitude toward cigarette smoking through their advertisements, particularly the barrage of commercials on television, which portray smoking as a harmless and enjoyable social activity that is not habit forming and involves no hazards to health.

1967 FTC Report at 28.

[13] *See, e.g.*, headline story in *The National Enquirer*, "Most Medical Experts Say: Cigaret Cancer Link is Bunk-70,000,000 Smokers Falsely Alarmed," (Mar. 3, 1968) (Pet. App. 227a).



effect of these efforts on Rose Cipollone and the public in general.[14]

## SUMMARY OF THE ARGUMENT

Preemption of traditional state common law tort claims is an extraordinary occurrence. Rarer still is the preemption of common law personal injury actions where the federal law provides no alternative remedy. In fact, it had never happened until the Court of Appeals' decision in this case.

The presumption against preemption, frequently articulated and variously described, has served as a gatekeeper for traditional rights and remedies defined by state common law. Congressional intent to override this presumption must be expressed with drastic clarity, especially if preemption would leave a legal vacuum where state common law once stood. The void created here by the Court of Appeals assumes that Congress, without a single word evidencing such intent, left citizens of the several states remediless, and those guilty of tortious conduct shielded by the very Act whose objective they have consistently sought to undermine.

The New Jersey Supreme Court in *Dewey* considered this result antithetical to fundamental principles of federalism and this Court's preemption jurisprudence. The *Dewey* court concluded that the State's time-honored authority to provide compensation to its citizens for injuries caused by the wrongdoing of others can not be swept away by the dubious inferences relied on by the Court of Appeals.

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[14] Almost without exception, the FTC's annual reports to Congress regarding the effectiveness of the federal warning concluded that the warnings were ineffective due, in large measure, to the defendants' advertising practices. These reports were excluded from evidence under the court's preemption decision.

## ARGUMENT

### INTRODUCTION

Under the Supremacy Clause, state law tort claims may be preempted where: (1) Congress states explicitly in the statute that such claims are displaced ("express preemption"), (2) Congress exclusively occupies a particular field with the intent to supplant such claims ("occupation of the field preemption"), or (3) state law actually conflicts with the federal statute ("actual conflict preemption"). *English v. General Electric*, ___ U.S. ___, 110 S. Ct. 2270, 2275 (1990). Because Rose Cipollone's claims do not fall into any of these categories, they are not preempted by the Labeling Act.

The Labeling Act contains no language explicitly preempting state law tort claims. Consequently, every court to consider this issue, including the Third Circuit,[15] has found no express preemption.[16] Because the Act contains

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[15] Pet. App. 95a.

[16] Twelve appellate courts – five federal and seven state – have addressed the preemption issue presented here. Their disagreement centers not on express preemption nor on occupation of the field preemption but rather on actual conflict preemption. *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181 (3d Cir. 1986) (Pet. App. 95a-108a); *Pennington v. Vistron Corp.*, 876 F.2d 414 (5th Cir. 1989); *Roysdon v. R.J. Reynolds Tobacco Co.*, 849 F.2d 230 (6th Cir. 1988); *Palmer v. Liggett Group, Inc.*, 825 F.2d 620 (1st Cir. 1987); *Stephen v. American Brands, Inc.*, 825 F.2d 312 (11th Cir. 1987); *Rogers v. R.J. Reynolds Tobacco Co.*, 557 N.E.2d 1045 (Ind. Ct. App. 1990); *Forster v. R.J. Reynolds Tobacco Co.*, 437 N.W.2d 655 (Minn. 1989) (reproduced at Pet. App. 164a-180a); *Dewey v. R.J. Reynolds Tobacco Co.*, 121 N.J. 69, 577 A.2d 1239 (1990) (reproduced at Pet. App. 181a-226a); *McSorley v. Philip Morris*, No. 536E (N.Y. App. Div. Feb. 4, 1991); *Hite v. R.J. Reynolds Tobacco Co.*, 578 A.2d 417 (Pa. Super. Ct. 1990); *Phillips v. R.J. Reynolds Industries, Inc.*, 769 S.W.2d 488 (Tenn. Ct. App. 1988); *Carlisle v. Philip Morris, Inc.*, 805 S.W.2d 498 (Tx. Ct. App. 1991) (reproduced at Respondents' Appendix ("Resp. App.") 6a-49a).



an express preemption provision that does not explicitly preclude common law tort actions, the preemption inquiry should end, in the absence of a physical impossibility to comply with federal and state law not present here.

It is equally clear that Congress did not intend to occupy the entire field of smoking and health and thereby displace plaintiff's common law tort claims. The Act and its legislative history establish that Congress intended to occupy only the narrow field of affirmative rulemaking with respect to warning labels on cigarette packages and in cigarette advertising.[17] As with express preemption, courts interpreting the Labeling Act have unanimously rejected "occupation of the field" preemption.

The last category, "actual conflict" preemption, has served as the source of disagreement among the courts. Actual conflict occurs (1) where it is physically impossible to comply with both the state and the federal requirements; or (2) where state law stands as an obstacle to the accomplishment of the purposes and objectives of Congress.

As to the physical impossibility prong, cigarette manufacturers have never denied they could pay money damages resulting from these suits as a cost of doing business, raise the price of cigarettes to reflect the true cost of the product, and at the same time comply with the labeling requirements of the Act. The Act also leaves them free to provide additional information regarding the

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[17] Congress preempted all state and local action, by statute, ordinance, or pronouncement, with respect to the content of the warning labels. In the interest of simplicity, all these activities are referred to herein, collectively, as "affirmative rulemaking." The 1969 amendment of subsection 5(b) expanded that portion of the field dealing with advertising of cigarettes beyond warning labels to include smoking and health-related affirmative rulemaking in the area of cigarette advertising and promotion.

nature and extent of the health hazards of their products. Indeed, no court has found actual conflict on the basis of physical impossibility.

Courts have parted company on the second prong of the actual conflict test – whether state law tort claims stand as an obstacle to the accomplishment of the two purposes of the Labeling Act. The language of the Act and its legislative history reveal that Mrs. Cipollone's common law tort claims present no obstacle and, in fact, may further the primary purpose of the Act – informing the public of the health hazards of cigarette smoking.

The hypothetical conflict conjured up by the cigarette manufacturers between Mrs. Cipollone's claims and the Act's secondary purpose – avoiding multiplicitous affirmative rulemaking with respect to cigarette warning labels – is legally insufficient to preempt Mrs. Cipollone's post-1965 claims. Further, any tension that may exist between common law tort actions and the Labeling Act was well understood and willingly accepted by Congress. Because Congress was principally attempting to inform the public of the hazards of smoking, only a distorted reading of the Act's secondary purpose could justify a finding of actual conflict preemption.

Defendants' argument that plaintiff's intentional tort claims are preempted ignores the distinction between nonfeasance and misfeasance. Plaintiff's claims are premised not on a breach of duty to act but rather on defendants' volitional acts intended to deceive the public regarding the health hazards of smoking. Defendants suggest that Congress intended to immunize them against the consequences of their intentional conduct designed to undermine the federally-mandated warning. Given the Act's stated purposes, it would be illogical to conclude that Congress contemplated, let alone sanctioned, such a result.

The Court of Appeals' decision in this case and its progeny reject traditional notions of federalism and the



teachings of this Court.[18] Before the decision, federal and state courts universally rejected manufacturers' arguments that compliance with federally-mandated labeling requirements precluded liability under state law in product liability failure to warn actions. After the *Cipollone* opinion, however, courts have split on the issue.[19] *Cipollone* has introduced confusion and engendered muddled thinking about preemption.

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[18] As the New Jersey Supreme Court stated in *Dewey v. R.J. Reynolds Tobacco Co.*, 121 N.J. 69, 93-4, 577 A.2d 1239, 1251 (1990) (Pet. App. 207a):

> We are persuaded by the view most forcefully stated by Solicitor General Kenneth Starr, in his unpublished monograph "The Law of Preemption," that "[o]ur federal system, with its high regard for the several States' powers of governance, requires that judges not preempt state laws lightly." *Id.* at 61. Judge Starr recalls Justice Frankfurter's observation that when the Supreme Court considers whether the Congress has preempted state law, " '[a]ny indulgence in construction should be in favor of the States, because Congress can speak with drastic clarity whenever it chooses to assure full federal authority.' " *Id.* at 86 [quoting *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U.S. 767, 780 (1947)].

[19] *See* Petition for Writ of Certiorari at 20.

## POINT I

## CONGRESS DID NOT EXPRESSLY PREEMPT ROSE CIPOLLONE'S COMMON LAW TORT CLAIMS

Congress did not leave to speculation the preemptive scope of the Labeling Act. It specified in plain unmistakable terms exactly what the Act preempts. The preemption section does not mention or address common law tort claims. Indeed, every court to examine the Act has found no ambiguity in the statutory text and has concluded that state common law tort claims are not expressly preempted. Yet defendants, undaunted by the reality of the language of the Act, have attempted to force it to say what it does not.

There is no doubt that Congress may expressly preempt state law through a federal act by explicitly voicing its desire to do so. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). However, such "express preemption" must be unmistakably clear from the language of the federal act. Where the statute's language is plain, the function of the court is to enforce it according to its terms, without resorting to evidence beyond the words of the statute. *West Virginia University Hospitals, Inc. v. Casey*, ___ U.S. ___, 111 S. Ct. 1138, 1147-48 (1991). Statutes in derogation of the common law are disfavored, strictly construed, and any ambiguity must be read to avoid repeal of the common law. *See* Sands, 2A *Sutherland Statutory Construction* § 47.24 at 203 (1973) and cases cited therein.

Congress amended the Labeling Act and its preemption provision in 1969. The statutory analysis, therefore, must be divided into two time frames. The first begins with the effective date of the Act, January 1, 1966, and ends on July 1, 1969, the effective date of the first amendment. During those years, the Act provided:

> PREEMPTION
>
> Sec. 5. (a) No statement relating to smoking and health, other than the statement required by section 4 of this Act [the warning label], shall be required on any cigarette package.
>
> (b) No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.



Pub. L. No. 89-92, 79 Stat. 282. Section 5(a) plainly means that no other governmental entity may require additional warning language on cigarette packages. Section 5(b) plainly means that no other governmental entity may require any warning language in cigarette advertising.[20]

The question then becomes: What state action *requires* cigarette manufacturers to include specific additional health warnings on cigarette packages or in cigarette advertising? The answer to this question must proceed from an understanding of what the word "require" means. It is a fundamental canon of statutory construction that, unless otherwise defined, words will be interpreted according to their common meaning. *Perrin v. United States*, 444 U.S. 37, 42 (1979). Because "require" is not defined in the Act, it must be interpreted in its plain, ordinary sense. *Black's Law Dictionary* defines "require" as "[t]o direct, order, demand, instruct, command, claim, compel, request, need, exact." It is not defined as "to influence, induce, motivate, persuade, or incline," any of which might arguably describe the ancillary effect of a successful tort suit. The element of compulsion serves as the definitional boundary between these two categories.

State requirements command specific conduct, leaving no lawful alternative other than to comply. One who fails to follow such a requirement breaks the law. It matters little which governmental institution issues the requirement. An injunction issued by a court of law may command the same specific behavior as a statutory

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[20] Neither section curtailed cigarette manufacturers' freedom to speak further on the issue of smoking and health, which indeed they did.

provision. Failure to comply with either edict results in criminal or civil penalty. The key is that neither allows any option other than to comply with the prescribed conduct. Therefore, any state statute, injunction, or executive pronouncement compelling cigarette manufacturers to place an additional health warning on cigarette packages and in cigarette advertising would be a "requirement" Congress explicitly preempted.

In contrast, common law product liability lawsuits do not compel specific behavior. Such lawsuits operate primarily to compensate injured individuals; they do not regulate. *See generally* W.P. Keeton, D. Dobbs, R. Keeton, D. Owen, *Prosser and Keeton on the Law of Torts* 5-6 (5th ed. 1984). They derive from the state policy determination that, as between the manufacturer and the injured user, the manufacturer is better situated to absorb the cost of injury and to build it into the price of the product.[21] Damage awards in product liability suits do not compel any behavior other than the payment of money damages. Cigarette manufacturers are free to build these damage awards into the price of their product and do nothing else or, alternatively, they may with unconstrained choice

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[21] The New Jersey Supreme Court has consistently expressed its concern for the protection of the consumer through the allocation of risk of injury. In *Beshada v. Johns-Manville Prods. Corp.*, 90 N.J. 191, 205, 447 A.2d 539, 547 (1982), the court noted:

> One of the most important arguments generally advanced for imposing strict liability is that the manufacturers and distributors of defective products can best allocate the costs of the injuries resulting from those products. The premise is that the price of a product should reflect all of its costs, including the cost of injuries caused by the product.

*See also Dewey v. R.J. Reynolds Tobacco Co.*, 121 N.J. 69, 91, 577 A.2d 1239, 1249-50 (1990) (Pet. App. 203a) (strong State interest in compensating those injured by manufacturers' products through state common law tort claims).



attempt to reduce the likelihood of future adverse verdicts.[22]

Defendants attempt to expand the explicit language of the preemption section to include Rose Cipollone's common law tort claims. As the defendants see it, her claims are expressly preempted by the Act. The catalyst for their argument is the language in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 246-47 (1959), where the Court noted that damage awards may have an ancillary regulatory effect. Defendants assert that Rose Cipollone's claims have the regulatory effect of requiring additional language on packages of cigarettes and in cigarette advertising. This argument fails for several reasons. First, this Court has recently concluded that decisions construing the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.*, such as *Garmon*, have no precedential value in construing the preemptive effect of unrelated federal acts. *English v. General Electric Co.*, ___ U.S. ___, 110 S. Ct. 2270, 2279 n.8 (1990).[23] Second, their

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[22] The Labeling Act left cigarette manufacturers free to provide additional health information to their consumers in numerous ways. They could include additional statements or symbols on cigarette packaging and in advertising; include inserts in cigarette packages; provide warning signs for use in places of sale and distribution; provide their consumers with pamphlets or other educational materials on the hazards of smoking; communicate the hazards to their consumers through the media in public interest announcements or "advertorials"; or modify their advertising and public relations to reflect the message conveyed by the health warning instead of to refute it. The cigarette industry could even petition Congress to change the language of the warning.

[23] Defendants' reliance on *Garmon* is also misplaced for several other reasons. First, *Garmon* did not involve a question of express preemption but rather one of implied preemption. Second, the case did not involve the preemption of state common law claims but rather state statutory provisions. 359 U.S.

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argument ignores the plain meaning of the words used by Congress. Third, it disregards the fact that if Congress, well aware of the existence of claims like Rose Cipollone's,[24] had intended to preempt them expressly, "it knew how to do so with unmistakable specificity," but it chose not to. *Dewey*, Pet. App. 207a. Fourth, the type of common law tort actions at issue do not "require" cigarette manufacturers to do anything other than to pay money damages.

The second time frame in question begins on July 1, 1969, the effective date of the amended preemption provision, and ends in 1981 when Mrs. Cipollone's cancer was diagnosed. During this period the applicable preemption provision read:

> PREEMPTION
>
> Sec. 5. (a) No statement relating to smoking and health, other than the statement required by section 4 of this Act, shall be required on any cigarette package.
>
> (b) No requirement or prohibition based on smoking and health shall be imposed under State

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at 239. Third, although the Court concluded that the damage award under consideration was preempted by the NLRA, it recognized that "[i]t may be that an award of damages in a particular situation will not, in fact, conflict with the active assertion of federal authority." *Id.*, at 247. Fourth, the Court stressed that with respect to the NLRA, unlike the Labeling Act, Congress did not foresee the difficulties created by the co-application of federal and state law. *Id.*, at 239-240. Fifth, unlike the Labeling Act, the NLRA grievance procedure provided an alternative remedy to the injured party. Sixth, the *Garmon* analysis has fallen into disfavor. *See e.g., Farmer v. United Brotherhood of C.&J. of America, Local* 25, 430 U.S. 290, 302 (1977) ("inflexible application of the [*Garmon*] doctrine is to be avoided, especially where the State has a substantial interest in regulation of the conduct at issue and the State's interest is one that does not threaten undue interference with the federal regulatory scheme.").

[24] *See infra* note 41.



> law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

Pub. L. No. 91-222, 84 Stat. 87.

Section 5(a) remained unchanged and only preempted other governmental entities from requiring additional warning language on packages of cigarettes. Amended section 5(b) expressly preempted states and their political subdivisions from imposing any requirements or prohibitions based on smoking and health in cigarette advertising and promotion. States remained free to effect the same traditional "police regulation" they could under the original Act.[25] Cigarette manufacturers still remained free to say more about the hazards of cigarettes, and they did. *See, e.g.*, J.A. 42, 72.

The purpose of this "perfecting amendment" was simply to clarify that state administrative agencies, counties, and municipalities continued to be preempted from imposing requirements or prohibitions.[26] Again, the preempted

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[25] *See* S. Rep. No. 566, 91st Cong., 2d Sess. 4, *reprinted in* 1970 U.S. Code Cong. & Admin. News 2652, 2655:

> [The Act] would in no way affect the power of any State or political subdivision of any State with respect to the taxation or the sale of cigarettes to minors, or the prohibition of smoking in public buildings, or similar police regulations. It is limited entirely to State or local requirements or prohibitions in the advertising of cigarettes. . . .

[26] *See* Conf. Rep. No. 897, 91st Cong., 2d Sess. 2, *reprinted in* 1970 U.S. Code Cong. & Admin. News 2676, 2677:

> In some instances, counties or municipalities exercise their authority over advertising by local ordinances, or regulations, or even occasionally by resolution. In order to avoid the chaos created by a multiplicity of conflicting regulations, however, the bill preempts State requirements or prohibitions with respect to the advertising of cigarettes based on smoking and health. This preemption is intended to include not only action by State statute but by all other administrative actions or local ordinances or regulations by any political subdivision of any State. . . .

"requirement" is compelling particular behavior. "Prohibition" is nothing more than the flip side of "requirement," proscribing certain behavior as opposed to demanding it. The net result is the same. Rose Cipollone's common law tort claims do not impose prohibitions any more than they impose requirements.

In an attempt to construct their express preemption argument, defendants seize on the phrase "state law," incorporated in amended subsection 5(b), and define it to include "state common law tort actions." They then join "state common law tort actions" with their misconceived *Garmon* "regulation" argument and declare – express preemption. Such linguistic alchemy cannot transform the explicit language of the Act to suit cigarette manufacturers' needs. Such reading into the statute to bring about an end not specified by the legislation has been repeatedly rejected by this Court. *See, e.g., West Virginia University Hospitals, Inc. v. Casey*, ___ U.S. ___, 111 S. Ct. 1138, 1148 (1991) (quoting *Iselin v. United States*, 270 U.S. 245, 250-251 (1926)):

> [The statute's] language is plain and unambiguous. What the Government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function.

When Congress expresses its intent to preempt state law in a federal act and a determination is made that the state law in question does not fall within the proscribed area, the preemption question is resolved. There is no need to infer intent. *See California Federal Savings & Loan Association v. Guerra*, 479 U.S. 272, 281 (1987). Congress has spoken in the Labeling Act and has done so clearly. The Court need look no further.



## POINT II

## CONGRESS DID NOT INTEND TO PREEMPT ROSE CIPOLLONE'S COMMON LAW TORT CLAIMS BY "OCCUPATION OF THE FIELD"

The second way Congress may preempt state law is by occupation of a field, which may be discerned either by a "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it" or a "federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). The Court will not lightly infer federal occupation of a field. Federal regulation of a field of commerce does not preempt state regulatory power unless "the nature of the regulated subject matter permits no other conclusion, or . . . Congress has unmistakably so ordained." L. Tribe, *American Constitutional Law* § 6-27 at 497 (2d ed. 1988) (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963)).

Because Congress can explicitly preempt state law when it chooses to do so, this Court has been circumspect in finding preemption when Congress does not clearly address the issue. As a general proposition, unless necessary, "Congress [does] not intend to displace state law." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). This Court has been particularly adverse to extending preemption where state law invoives traditional state interests.

Therefore, "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 230. This heightened presumption against preemption exists because it encompasses actions that lie in fields traditionally occupied by the states. *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 144. Historically, the states have been entrusted with defining and redressing injuries arising from their citizens' failure to conform their behavior to societal standards of right and wrong. *See English v. General*

*Electric Co.*, ___ U.S. ___, 110 S. Ct. 2270, 2277 (1990). This right to redress lies at the heart of our nation's civil, moral and judicial system. As Chief Justice Marshall explained, "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 162 (1803). *See also Cipollone*, 593 F. Supp. at 1153 (Pet. App. 121a-122a) ("Torts, such as those alleged here, are precisely the sort of legal action that falls within the scope of a state's historical and prototypical powers.") (*citing Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529, 1542 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984); *Feldman v. Lederle Laboratories*, 97 N.J. 429, 462, 479 A.2d 374 (1984)).

The Court has never countenanced implied preemption of state common law tort claims where to do so would leave injured persons without a remedy.[27] The

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[27] *See Silkwood v. Kerr-McGee Corp.*, 464 U.S. 249, 251 (1984) (holding Atomic Energy Act did not preempt state law punitive damages action against nuclear facility where federal act did not provide for compensation for injured workers. "It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct"); *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987) (refusing to preempt certain property owners' tort remedies despite defendants' compliance with Clean Water Act in order not to leave property owners without a remedy); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985) (rejecting preemption of Indian common law claims for fair rental value of land where to do otherwise would leave them remediless); *United Construction Workers v. Laburnum Construction Co.*, 347 U.S. 656, 663-64 (1954) (declining to preempt state law tort claims in heavily regulated labor relations field because to do so would deprive plaintiff of property without recourse or compensation). *Cf. San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 246-47 (1959) (preempting state law claims but emphasizing availability of alternate remedy under NLRA).



philosophy underlying this reluctance to preempt state remedies where no federal remedies exist was summarized by Justice Blackmun in *Silkwood v. Kerr-McGee Corp.*:

> Because the Federal Government does not regulate the compensation of victims, and because it is inconceivable that Congress intended to leave victims with no remedy at all, the pre-emption analysis established by *Pacific Gas* comfortably accommodates – indeed it compels – the conclusion that compensatory damages are not pre-empted. . . .

464 U.S. at 263-4 (dissenting on punitive damages issue) (citations omitted).

The Labeling Act provides no alternative compensation scheme. Given the strong presumption against preemption – stronger still where victims are deprived of traditional state remedies – it is inaccurate and uncharitable to assume that Congress would, without comment, eliminate vital state law claims and immunize cigarette manufacturers against the consequences of their tortious conduct.

### A. Congress Intended to Occupy Only the Narrow Field of Affirmative Rulemaking With Respect to Warning Labels on Cigarette Packages and In Cigarette Advertising

The Labeling Act and its legislative history establish that Congress intended to occupy the narrow field of affirmative rulemaking with respect to health warnings on cigarette packages and in cigarette advertising. This field was expanded by the 1969 amendment of preemption subsection 5(b) to include smoking and health-motivated rulemaking with respect to cigarette advertising and promotion generally. Neither the Act nor its legislative history suggests that Congress even considered preempting common law tort claims when it enacted or amended the Act. An examination of the genesis of the Labeling Act is instructive on this point.

Although there had been sporadic interest in the late 1950's and early 1960's by various states to require health warnings on cigarette packages,[28] it was not until the release of the 1964 Surgeon General's Report[29] that states and federal agencies focused on the health hazards of smoking and the need to advise the public of those hazards. On January 17, 1964, the FTC proposed a Trade Regulation Rule requiring manufacturers to place a health warning on all packages of cigarettes and in all cigarette advertisements.[30] At the same time, states

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[28] *E.g.*, Mass. H. 2078, 160th General Court, 2d Sess. (1958); Mo. H.B. 329, 70th General Assembly, 1st Sess. (1959); Neb. L.B. 368, 73rd Leg. (1963); N.M. S. 57 26th Leg. (1963); N.Y. A. 2909, 183rd Annual Sess., Leg. (1960); Pa. S. 1137, 143rd General Assembly (1959); S.C. H. 1740, 95th General Assembly, 1st Sess. (1963).

[29] The report concluded: "Cigarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action." H.R. Rep. No. 449, 89th Cong., 1st Sess., 2 *reprinted in* 1965 U.S. Code Cong. & Admin. News 2351. Specifically, the report found that smoking was related to lung cancer, chronic bronchitis, emphysema, cardiovascular diseases, and cancer of the larynx. 1964 Surgeon General's Report, at 31-32.

[30] The FTC concluded that the absence of accurate health information in cigarette ads rendered those ads false and/or deceptive within the meaning of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. *See* 29 Fed. Reg. 8324 (1964), 29 Fed. Reg. 530 (1964). The proposed rule would have required the following warnings:

a. CAUTION – CIGARETTE SMOKING IS A HEALTH HAZARD: The Surgeon General's Advisory Committee on Smoking and Health has found that cigarette smoking contributes substantially to mortality from certain specific diseases and to overall death rate; or

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concerned with the health and safety of their citizens proposed or adopted mandatory warning label requirements for cigarette packages. *See, e.g.*, 1965 N.Y. Laws Ch. 470 (requiring label stating: *"Warning: Excessive Use Is Dangerous to Health"*).

In the wake of this activity, Congress turned its attention to the cigarette smoking and health issue. Primarily, it was concerned with advising the public that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on cigarette packages. Congress also recognized, however, that diverse labeling requirements could impede the national economy. Therefore, it reserved to itself the exclusive authority to enact legislation specifying the language to be included in the warning label on cigarette packages.

That Congress was thinking only in terms of preempting affirmative rulemaking is reflected throughout the Congressional record.[31] All discussions of preempted

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b. CAUTION: Cigarette smoking is dangerous to health. It may cause death from cancer and other diseases.

[31] For example, Congressman Fountain of North Carolina declared:

> [T]he problem here and the facts are so obvious – with every state and probably many municipalities passing different regulations requiring the manufacturers of cigarettes to have different labels on packages going into different States and areas – that the situation would become intolerable and so confusing and so frustrating to all concerned that the entire tobacco industry might be destroyed. For these reasons I believe in the doctrine of preemption in this particular situation.

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activity were couched in terms of "passing bills," "passing laws," "pending bills" and "passing regulations."[32] This view was also shared by the cigarette companies.[33]

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Cigarette Labeling and Advertising: Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, on H.R. 643, 1237, 3055 and 6543, 91st Cong., 1st Sess., 30 (1969) (hereafter "1969 House Hearings").

[32] *See, e.g.*, 1969 House hearings at 30 (discussing "laws" and "regulations"); *Id.* at 554 (discussing "bills pending before State legislatures"); H.R. Rep. No. 449, 89th Cong., 1st Sess., 3, *reprinted in* 1965 U.S. Code Cong. & Admin. News 2350, 2352 (discussing "a multiplicity of State and local regulations potentially creating chaotic marketing conditions and consumer confusion").

[33] Bowman Gray, Chairman of the Board of R. J. Reynolds Tobacco Company and Chairman of the Executive Committee of the Tobacco Institute, testified before Congress as to the industry's understanding of the preempted "field." He argued that "any such legislation should make absolutely clear that the Congressional statute preempts the field . . . . It would be intolerable if the state and federal agencies were to remain free to pass conflicting laws or to impose conflicting regulations on this subject." Cigarette Labeling and Advertising: Hearings before the Committee on Commerce, United States Senate, on S. 559 and S. 547, 89th Cong., 1st Sess., 246 (1965). Significantly, the cigarette industry's spokesman did not include state law tort claims in his list of "intolerables."

The tobacco industry reconfirmed its understanding during Congressional hearings on the 1969 amendments to the Act. Joseph F. Cullman III, Chairman of the Board of Directors and Chief Executive Officer of Philip Morris, Inc. and then Chairman of the Executive Committee of the Tobacco Institute, testified on the preemption issue. His ultimate concern was that "if Congress does not extend [the preemption provision] there will be piecemeal and conflicting Federal and State regulations in this field." 1969 House Hearings at 554.



Additional indicia that the preempted field is a narrow one derives from the extensive regulation of cigarettes by states and federal agencies in areas that clearly relate to smoking and health. For example, state and local governmental bodies regulate the sale of cigarettes to minors,[34] the sale of cigarettes in vending machines,[35] the use of cigarettes in public places and in places of business,[36] and the promotional activities of cigarette manufacturers.[37] States also impose taxes on cigarettes, and earmark the proceeds for public interest anti-smoking campaigns.[38]

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[34] *E.g.*, Iowa Code Ann. § 98.2 (1984 & Supp. 1991); Ala. Code § 13A-12-3 (1982 & Supp. 1990); Ind. Code Ann. § 35-46-1-10 (West 1986 & Supp. 1990); N.H. Rev. Stat. Ann. § 78:12-b (Supp. 1990); Minneapolis, Minn., Code tit. 13, ch. 281, § 281.50 (1990); Gillette, Wyo., Code § 14-39 (1990).

[35] *E.g.*, Colo. Rev. Stat. § 18-13-121(4)(a) (Supp. 1990); Me. Rev. Stat. Ann. tit. 22, § 1628 (Supp. 1990); Ga. Code Ann. § 16-12-173 (1988); Idaho Code § 18-1503 (1987); Mora, Minn., Municipal Code ch. 108, § 108.005 (1990).

[36] *E.g.*, Fla. Stat. Ann. § 386.201-.209 (1986 & Supp. 1991); N.J. Stat. Ann § 26:3D-1 to 54 (West 1987 & Supp. 1990); Me. Rev. Stat. Ann. tit. 22, §§ 1578, 1578-A, 1579-A (Supp. 1990); San Luis Obispo, Cal., Ordinance 1172 (1990); Snowmass Village, Colo., Code ch. 10, art. 6, §§ 6-1 to -10 (1989).

[37] *E.g.*, Minn. Stat. § 325F.77(3)-(4) (1990) (promotional distribution of tobacco products); Gillette, Wyo., Code § 14-39 (1990) (distribution of tobacco products to minors); Minneapolis, Minn., Code tit. 13, ch. 281, § 281.55 (1990) (distribution of free tobacco); Bowie, Md., Code § 18.13 (1986) (distribution of free tobacco products on public property); Boston, Mass., Code § 16-2.3 (1984) (distribution of tobacco products in public places).

[38] *E.g.*, Cal. Rev. & Tax Code §§ 30001, 30121-30130 (Supp. 1991); Cal. Health & Safety Code §§ 24160-24169.8 (Supp. 1991). This tax will raise $650 million annually to be used for the State's smoking and health education program. These revenues could as easily be placed in a fund to compensate smokers for smoking-related diseases.

Indeed, states may be free to ban the sale of cigarettes altogether. *See Posadas de Puerto Rico Ass'n v. Tourism Co.*, 478 U.S. 328, 346-47 (1986). Surely, such wide latitude would not be enjoyed by the states if Congress intended to occupy the entire field of cigarette smoking and health.

When the federal government completely occupies a given field or an identifiable portion of it, "the test [of preemption] is whether the matter on which the State asserts the right to act is in any way regulated by the Federal Act." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 236. To the extent it is, the federal scheme will prevail. In this case, the federal government does not regulate the compensation of persons injured by cigarettes at all. Under the *Rice* analysis, therefore, actions for compensation based on state common law are outside the prohibited zone.

### B. The Labeling Act's Legislative History Reflects Congress' Intent That Common Law Tort Actions Would Continue

Further evidence that Congress intended to occupy only the narrow field of affirmative rulemaking is found in specific references to tort actions in the Labeling Act's legislative history, which reflect Congress' expectation that traditional state law tort actions would continue. The assumption that such actions would coexist with the federal regulation was well recognized, frequently articulated, and never doubted.

Cigarette smokers had been bringing state law tort suits against cigarette companies for failure to warn and deceptive advertising for many years prior to Congress' decision to enact the Labeling Act.[39] Members of Congress were well aware of this and, although they

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[39] These cases date back to 1954. *See, e.g., Green v. American Tobacco Co.*, 409 F.2d 1166 (5th Cir. 1969), *cert. denied*, 397 U.S.

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anticipated the Act might have some effect on these cases, they expected these cases to continue.[40]

The Act's legislative history is replete with discussions of how the Act might affect cigarette litigation.[41]

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911 (1970); *Pritchard v. Liggett & Myers Tobacco Co.*, 350 F.2d 479 (3d Cir. 1965), *cert. denied*, 382 U.S. 987 (1966); *Ross v. Philip Morris & Co.*, 328 F.2d 3 (8th Cir. 1964); *Green v. American Tobacco Co.*, 325 F.2d 673 (5th Cir. 1963), *cert. denied*, 377 U.S. 943 (1964); *R. J. Reynolds Tobacco Co. v. Hudson*, 314 F.2d 776 (5th Cir. 1963); *Lartigue v. R. J. Reynolds Tobacco Co.*, 317 F.2d 19 (5th Cir.), *cert. denied*, 375 U.S. 865 (1963); *Green v. American Tobacco Co.*, 304 F.2d 70 (5th Cir. 1962); *Pritchard v. Liggett & Myers Tobacco Co.*, 295 F.2d 292 (3d Cir. 1961); *Cooper v. R. J. Reynolds Tobacco Co.*, 256 F.2d 464 (1st Cir.), *cert. denied*, 358 U.S. 875 (1958); *Cooper v. R. J. Reynolds Tobacco Co.*, 234 F.2d 170 (1st Cir. 1956); *Albright v. R. J. Reynolds Tobacco Co.*, 350 F. Supp. 341 (W.D. Pa. 1972), *aff'd*, 485 F.2d 678 (3d Cir. 1973), *cert. denied*, 416 U.S. 951 (1974); *Fine v. Philip Morris, Inc.*, 239 F. Supp. 361 (S.D.N.Y. 1964); *Green v. American Tobacco Co.*, 154 So. 2d 169 (Fla. 1963), *cert. denied*, 377 U.S. 943 (1964); *Mitchell v. American Tobacco Co.*, 183 F. Supp. 406 (M.D. Pa. 1960).

By 1965, this Court had denied petitions for certiorari in three of these cases: *Pritchard v. Liggett & Myers, Inc.*, *Green v. American Tobacco Co.*, and *Cooper v. R. J. Reynolds Tobacco Co.*

[40] As this Court observed in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 249, 254 (1984), with reference to the legislative history pertinent there, "the importance of the legislation for present purposes is not so much in its substance, as in the assumptions on which it was based."

[41] An example is the colloquy between Congressman Springer of Illinois, Member of the Committee on Interstate Commerce, and Congressman Fascell of Florida in the floor debate on the proposed Act:

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Questions regarding the effect the warnings would have on state law causes of action and defenses only make

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> MR. FASCELL: Is there any legal significance either for the manufacturer or user by way of presumption or otherwise because this warning is placed by law on a package of cigarettes?
>
> MR. SPRINGER: For injury?
>
> MR. FASCELL: Yes.
>
> MR. SPRINGER: I do not believe there is anything in this bill that would have anything to do with what the gentleman from Florida suggests.
>
> MR. FASCELL: If a smoker is injured as a result of smoking, and there is a warning required by law that smoking may be injurious to health, does that waive or create a legal presumption or defense in a personal injury suit because of the use of the article notwithstanding the warning?
>
> MR. SPRINGER: I am not sufficiently a lawyer in Federal Trade Commission practices to be able to advise the gentleman.
>
> MR. FASCELL: The legislative record makes it clear that passage of this law and compliance by the manufacturer in no way affects the right to raise the defense of an "assumption or [sic] risk" and the legal requirement for such a defense to prevail; nor does it shift the burden of proof, nor could it be considered a legal or factual bar to the plaintiff user.

111 Cong. Rec. 16,543-44 (1965).

A similar discussion transpired between Mr. Theodore Ellenbogen, Acting Assistant General Counsel to the Department of Health, Education and Welfare, and Mr. James A. Mackay, Congressman from Georgia and Member of the Committee on Interstate and Foreign Commerce, in the 1965 hearings:

> MR. MACKAY: I would like to ask you this as a lawyer. Would not the presence of the type of

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sense if Congress did not intend to preclude state law tort actions. Even the tobacco industry readily acknowledged the Act would not immunize it from state law tort claims.[42]

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> warning suggested in these bills greatly strengthen the hand of a defendant in a tort case?
>
> MR. ELLENBOGEN: In the long run it might do so, because those cases that I have read – and I have not made a real study of this particular thing – but the *Green [v. American Tobacco]* case, for example, is based, I believe, on the implied warranty of fitness, and there being no notice of the health hazard to the consumer.

Cigarette Labeling and Advertising: Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, on H.R. 2248, 3014, 4007, 7051, and 4244, 89th Cong., 1st Sess., 176 (1965). Mr. Ellenbogen considered such suits "a private matter [that] would not be regulated by [the Act]." *Id.*

[42] During the 1969 hearings, Joseph F. Cullman III of Philip Morris testified:

> MR. MOSS (Congressman, State of California): You stated that [the Act] had two principal objectives in your statement on page 14, first to inform the public concerning smoking and health, and second, to protect commerce against diverse, nonuniform and confusing, et cetera, requirements. Wasn't there a third advantage also realized, that of relieving the cigarette manufacturers of liability which might arise from a directly traceable illness to smoking by a person who smoked notwithstanding that warning? . . .
>
> MR. CULLMAN: I would answer that in the negative, and say that that was not part of our objective in any way.

(Continued on following page)

Congressional debate over the impact of the warning on state common law tort actions evidences Congress' intent not to displace these actions. The entire legislative history of the Act and its amendment contain not a whisper to the contrary.

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(Continued from previous page)

MR. MOSS: Was it a fringe benefit?

MR. CULLMAN: I don't see that it was. We have been involved in litigation long before that, . . .

MR. WATSON (Congressman, State of South Carolina): Assuming just a little further the line of questioning of my friend from California, *nowhere in the Act of 1965 does it preclude an individual or prevent an individual from pursuing a common-law liability claim against any tobacco company* so far as I know, and if the gentleman from California is aware of anything to the contrary, he should present it.

1969 House Hearings at 577-79 (emphasis added).



## POINT III

## ROSE CIPOLLONE'S COMMON LAW TORT CLAIMS DO NOT ACTUALLY CONFLICT WITH THE LABELING ACT

This Court has identified two narrow and specific categories of "actual conflict" preemption: (1) where it is physically impossible to comply with both the state and federal law, and (2) where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *Maryland v. Louisiana*, 451 U.S. 725, 747 (1981). Without question, it is not physically impossible for cigarette manufacturers to comply with the Act and to pay common law tort damages. No manufacturer has ever claimed the contrary. With respect to whether state law tort claims stand as an obstacle to the accomplishment of the Act's purposes and objectives, Rose Cipollone's claims can only further the Labeling Act's informational goal and will not frustrate its objective to avoid multiple labeling and advertising requirements.

### A. Purposes and Objectives of the Act

The threshold question in any conflict analysis is a determination of the purpose of the federal legislation. The Labeling Act's two articulated purposes are that:

> (1) the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and
>
> (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

Pub. L. No. 89-92, 79 Stat. 282.

As the plain language of the statute indicates, Congress did not assign these dual purposes equal weight. The purpose of avoiding diverse labeling requirements and thereby protecting commerce was secondary to the primary purpose of disseminating health information. As described in the House Report accompanying the 1965 Act, "[t]he *principal* purpose of the bill was to provide adequate warning to the public of the potential hazards of cigarette smoking by requiring the labeling of cigarette packages." H.R. Rep. No. 449, 89th Cong., 1st Sess. 1, *reprinted in* 1965 U.S. Code Cong. & Admin. News 2350 (emphasis in original). Congress' interest in protecting commerce rises only "to the maximum extent consistent" with the goal of adequately informing the public of the health hazards of smoking.

This balance of purposes provides an even more compelling argument for rejecting preemption than did the balance of purposes weighed in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), where this Court held the Atomic Energy Act did not preempt a state common law tort action seeking punitive damages for a worker injured at a federally regulated and licensed nuclear plant. The primary purpose of the Atomic Energy Act was to promote nuclear power – not to protect the health and safety of the public. *Id.* at 257. Even so, the Court observed that "the promotion of nuclear power is not to be accomplished 'at all costs' " but "only to the extent it is consistent 'with the health and safety of the public.' " *Id.* (*citing* the applicable statute and *Pacific Gas & Electric v. State Energy Resources Conservation Commission & Development*, 461 U.S. 190, 222 (1983)).

In contrast to the Atomic Energy Act, the primary goal of the Labeling Act is to inform the public of the health hazards associated with smoking. Congress did not intend "to curtail the potential flow of information lest the public learn too much about the hazards of smoking for the good of the tobacco industry and the economy." *Banzhaf v. F.C.C.*, 405 F.2d 1082, 1089 (1968), *cert. denied*, 364 U.S. 842 (1969) (construing preemption provision of Labeling Act).



### B. Common Law Tort Claims Will Further, Rather Than Conflict With, the Primary Purpose of the Act – Informing the Public About the Health Hazards of Cigarette Smoking

To the extent they have any effect at all, Mrs. Cipollone's state law tort claims will only serve to promote the Act's main objective. Conceivably, such actions might encourage cigarette manufacturers to provide more information to the public regarding the health hazards of cigarettes, to present the information in an effective form, or to communicate more truthfully with the public.

Conversely, preemption of state law tort claims would undermine the Act's informational goal and eliminate any incentive for the cigarette companies to disseminate truthful information to the public regarding the nature and extent of the health consequences of cigarette smoking. Preemption would permit the cigarette manufacturers to "deny or refute the risks of cigarette smoking with impunity and immunity so long as the little rectangle with the necessary language appears in its advertising and on its cigarette packages." *Cipollone*, 649 F. Supp. 664, 667 (D.N.J. 1986).

For example, cigarette manufacturers could incorporate known carcinogenic materials in their products without warning consumers, and yet enjoy total immunity from liability for the harm they know will result.[43] They could discover a causal link between their products and previously unknown but serious diseases, withhold the information and, again, remain unaccountable. They

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[43] For years *after* the Act was passed, DDD and other harmful pesticides were knowingly incorporated in cigarettes, and yet the manufacturers did nothing to warn consumers. J.A. 187-89.

could devise public relations plans and advertising campaigns to overcome the effectiveness of the federally-mandated warning, all without liability. Unfortunately, these images reflect reality.[44] That being the case, a preemption shield guaranteeing defendants' continued ability to act with immunity directly contravenes the Act's main objective.

### C. Common Law Tort Claims Do Not Actually Conflict With the Secondary Purpose of the Act – Avoiding a Multiplicity of Labeling Requirements

#### 1. It is Not Impossible for Defendants to Comply With the Labeling Act and to Pay Money Damages

As noted, one of the tests for determining whether an actual conflict exists is whether it is impossible to comply with both the federal and state law. Compliance by defendants with both the labeling requirements of the Act and state common law damage awards is not a physical impossibility. As Justice Blackmun stated in *Silkwood*, "[w]hatever compensation standard a State imposes, whether it be negligence or strict liability, a [defendant] remains free to continue operating under federal standards and to pay for the injury that results. This presumably is what Congress had in mind when it preempted state authority to set administrative regulatory standards but left state compensatory schemes intact." 464 U.S. at 264 (dissenting on punitive damages issue). That was true in regard to nuclear energy. It is equally true here. The imposition of tort liability on cigarette manufacturers would leave them with a multitude of affirmative choices,[45] in addition to the option of doing nothing other than paying damage awards.

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[44] *See, infra* Point IV.

[45] *See supra* note 22.



#### 2. The Hypothetical Conflict Asserted by Defendants is Insufficient to Preempt Common Law Tort Claims

This Court has repeatedly stated that potential conflict is not enough to require preemption – the conflict must be real.[46] Defendants' asserted conflict is that a compensatory award on Rose Cipollone's post-1965 claims would compel cigarette manufacturers to include specific additional warning labels on packages of cigarettes sold in New Jersey and to include specific warning language in advertising appearing in New Jersey. They contend that jury verdicts in other states would establish other warning requirements, and that the result would be multiple, nonuniform warnings, which would conflict with the purposes of the Act.

The defendants cannot, however, explain how this feared conflict derives from a jury award of compensatory damages. Jury verdicts for personal injuries in product liability actions do not create the "requirements" that concerned Congress. Such verdicts do not compel particular behavior, do not advise a manufacturer what activities it must curtail or implement, and do not inform a defendant as to the acceptable method of communicating information. For example, if a jury returned a favorable verdict on Mrs. Cipollone's post-1965 claims, even assuming it was based on special interrogatories, at most it would say: "Defendants failed to adequately warn Mrs.

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[46] The Court held in *English*, 110 S. Ct. at 2278, that "for a state law to fall within the pre-empted zone, it must have some direct and substantial effect on the decisions made by those" who must adhere to the corresponding federal law. *See also Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982) ("The existence of a hypothetical or potential conflict is insufficient to warrant the pre-emption of the state statute."); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 446 (1960) ("[T]his Court's decisions . . . enjoin seeking out conflicts between state and federal regulation where none clearly exists.").

Cipollone of the health hazards of cigarette smoking." The jury verdict would not tell the defendants of what specific hazards they should have warned, the precise language they should have used, the method they should have employed for conveying the information, or whether, but for their advertising and promotional practices, the federally-mandated warning would have sufficed.

Even if defendants were permitted to speculate how they might modify their behavior to avoid future adverse jury verdicts, they must concede the existence of a multitude of choices, none of which are constrained by the Act. For while it is clear that Congress intended to preclude states and federal agencies from promulgating rules requiring different warnings on cigarette packages, nothing in the Act precludes cigarette manufacturers from complying with the Act and at the same time providing additional information to consumers by means other than modifying the warning label.

Both before and after the effective date of the Act, cigarette manufacturers considered themselves free to provide the public with additional "health" information regarding their product. Unfortunately, they have done so only to cast doubt on the verity of the federally-mandated warning. Certainly, it could not have been Congress' intent to prohibit the industry from providing additional truthful information but to permit it to disseminate false and misleading information.

Finally, if cigarette manufacturers were queried how they would respond to a damage award on post-1965 common law tort claims they would, if truthful, confess they would pay the verdict, continue with business as usual, and build the damages into the cost of the product. Significantly, the defendants do not disagree. In fact, the industry has repeatedly dismissed these suits as a mere



financial flyspeck.[47] By speculating that adverse jury verdicts on state law tort claims may cause them to exercise one or more of their optional responses, the defendants are positing, at best, a hypothetical conflict, which is simply not enough.

### 3. Congress Has Accepted Any Tension That Might Arise From State Common Law Tort Actions

Although this Court has recognized that damage awards in common law tort actions may create a "tension" with the purpose of a federal act, such tension is insufficient to give rise to "actual conflict" preemption unless otherwise articulated by Congress. Explicit references to tort actions during the course of Congressional debate left no doubt that Congress recognized the existence of common law tort claims and willingly accepted any tension created between them and the federal act. *See supra* Point II B.

In *Silkwood*, the Court held that given the strong state interest and the presumption against preemption, whatever tension was created between the federal law and the state punitive damage action was tolerable:

> No doubt there is tension between the conclusion that safety regulation is the exclusive concern of the federal law and the conclusion that a State may nevertheless award damages based on its own law of liability. But as we understand what was done over the years in the legislation

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[47] *See, e.g.*, Liggett Group, Inc. Annual Report to Shareholders, 1988, at 28; Securities and Exchange Commission, Quarterly Report Under Section 13 or 15(d) of the Securities Exchange Act of 1934, Philip Morris Companies Inc. and Subsidiaries, Notes to Consolidated Financial Statements, at 10 (Sept. 30, 1988); *Setback to Tobacco Industry Is Termed Slim by Analysts*, The New York Times, June 14, 1988, at B4.

> concerning nuclear energy, Congress intended to stand by both concepts and to tolerate whatever tension there was between them. We can do no less.

464 U.S. at 256. *See also English*, 110 S. Ct. at 2280-1 (nuclear plant liable for intentional infliction of emotional distress of worker fired for whistle-blowing although federal regulations provide specific remedies for whistleblowers under the Energy Reorganization Act); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 108 S. Ct. 1704, 1712 (1988) ("Congress may reasonably determine that incidental regulatory pressure [from damage awards] is acceptable, whereas direct regulatory authority is not.").

The narrow doctrine of "actual conflict" preemption only applies where compliance with state law is impossible or where the operation of state law frustrates the federal purpose. In this case, Congress has made clear that if a "tension" exists between the Act and common law tort claims, it is eminently acceptable and poses no obstacle to Congress' objectives.



## POINT IV

## CONGRESS DID NOT PREEMPT ROSE CIPOLLONE'S INTENTIONAL TORT CLAIMS

Mrs. Cipollone's intentional tort claims are not preempted by the Labeling Act, even under defendants' theory of preemption. An obvious, logical, and doctrinal distinction exists between failure to warn, which derives from a breach of an existing duty, and intentional deception of consumers, which arises from defendants' affirmative conduct designed to neutralize the effect of the federally-mandated warning by misrepresenting and mischaracterizing facts to the public. Such intentional conduct frustrates the educational objective of the Act. Furthermore, defendants' actual conflict argument, predicting multiple and confusing warnings, simply does not apply where the tort is premised on cigarette manufacturers' independent choice to address the public.[48]

An adverse verdict on Mrs. Cipollone's intentional tort claims could not result in the imposition of the defendants' hypothesized affirmative duty to say more. Such a verdict would, at most, mean that when the defendants choose to act and fail to do so honestly, they must pay for any resulting damage. Simply put, the issue turns on the distinction between nonfeasance and misfeasance.

The cigarette manufacturers have, of their own volition, addressed the public on the subject of smoking and health. Sadly, most of what they have chosen to say is not true. Knowing that millions of their consumers craved

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[48] As the Supreme Court of Minnesota recently explained in *Forster v. R. J. Reynolds*, 437 N.W.2d 655, 662 (1989) (Pet. App. 177a), an action for common law misrepresentation "is based on a duty to tell the truth, not on a duty to warn." Although the Minnesota court found that the Labeling Act preempted failure to warn claims, it held that the manufacturer could still be held liable if it "chooses to provide further information." *Id.*

information that would help them rationalize their continued smoking, the tobacco industry designed sophisticated public relations and advertising campaigns to neutralize the federally-mandated warning and thereby assuage smokers' fears. These efforts were carried out by the cigarette companies individually through their product advertising,[49] and in concert through their trade associations, the Tobacco Institute and the Council for Tobacco Research.

An illustrative example of the joint industry effort is seen in 1967. Then, fearful of the impact of government efforts to educate the public about the health hazards of smoking, the tobacco industry hired a number of public relations firms to examine how they might best minimize the impact of such government action on sales. One such consultant was Ted Bates & Co., whose research findings, memorialized in a confidential report in 1967, revealed that "smokers are compelled to believe the government has not proved its case [and] want positive evidence on the other side to neutralize the government's position." J.A. 39. The report concluded:

> 1. The objective "restore controversy" should be changed to "neutralize effect of government action."

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[49] The FTC has concluded in its annual reports beginning with its first report to Congress in 1967 that the tobacco industry's advertising has effectively negated the effectiveness of the federally-mandated warning.

> Cigarette commercials continue to appeal to youth and continue to blot out any consciousness of the health hazards. . . . To allow the American people, and especially teenagers, the opportunity to make an informed and deliberate choice of whether or not to start smoking, they must be freed from constant exposure to such one-sided blandishments and told the whole story.

1967 FTC Report at 29.



* * *

> 3. If any consumer advertising is done, a direct approach appears called for – the more directly it challenges the Surgeon General's position, the better.

J.A. 37. These recommendations served as a basic blueprint for much of the industry's public relations thereafter. Each time a Surgeon General's Report was issued, the industry responded by attacking it directly. At every opportunity, the industry took out "advertorials" in newspapers across the country such as "The question about smoking and health is still a question," which appeared in 1970. J.A. 42. It buttressed these public statements by referring to the millions of dollars the industry was spending on "independent" research conducted through its Council for Tobacco Research. J.A. 43. In reality, CTR's research was neither independent nor designed to resolve the smoking and health "question." As the scientific director of one of the defendants stated in a 1974 confidential corporate memo to his company's chief executive officer:

> Historically, the joint industry funded smoking and health research programs have not been selected against specific scientific goals, but rather for various purposes such as public relations, political relations, position for litigation, etc. Thus, it seems obvious that reviews of such programs for scientific relevance and merit in the smoking and health field are not likely to produce high ratings.

J.A. 60.

The industry went so far as to have employees of its public relations firms write medical articles, under fictitious names, that appeared in the popular press directly challenging the Surgeon General's pronouncements. Examples of this include the "Cigaret Smoking and Cancer Link is Bunk" article, Pet. App. 227a, and the "To Smoke or Not to Smoke – That is Still the Question" article. Senate Cong. Rec., March 27, 1968, S. 3415-19.

As reported in a confidential memo to the President of the Tobacco Institute in 1972, the industry strategy, designed "to defend itself on three major fronts – litigation, politics and public opinion," had been very successful. J.A. 51-52. The memo noted, however, the need to develop a new story line if this success were to continue. The new message would argue the "Multi-factorial" and "Constitutional" hypotheses to explain the increased incidence of cancer in smokers. This message was not based on scientific research but rather on public relations research designed to determine how the industry could most effectively assuage its consumers' fears. The document noted:

> Our 1970 public opinion survey showed that a majority (52%) believed that cigarettes are *only one of the many causes* of smokers having more illnesses. It also showed that half of the people who believed that smokers have more illness than non-smokers accepted the constitutional hypothesis as the explanation. Thus, there are millions of people who would be receptive to a new message, stating:
>
> > Cigarette smoking may not be the health hazard that the anti-smoking people say it is *because other alternatives are at least as probable.*

J.A. 53 (emphasis in original). This modification in strategy served as the latest weapon in the tobacco industry's arsenal for a new era of neutralization of government action. However, the tried and true "Can We Have An Open Debate about Smoking" strategy continued. J.A. 72.

The individual company efforts to mislead consumers were as effective, though somewhat less obvious. For example, Lorillard's internal marketing research reveals that the company was well aware that True cigarette "prone" smokers viewed the brand "as a healthy cigarette." With that understanding, they devised their advertising campaigns "[t]o touch the emotional and/or intellectual pressure points associated with the decision to move to True. For example, – the decision to quit smoking." J.A. 65. This strategy is seen in ads featuring copy such as "True, Easy on your mind. Easy on your taste," and "Considering all I heard, I decided to either quit or smoke True. I smoke True."



These few examples of defendants' intentional wrongdoing provide only a flavor of the cigarette industry's extraordinary efforts to deceive their customers concerning the nature and extent of the health hazards of smoking. Permitting Mrs. Cipollone's claims based on these deceptions will not result in any affirmative duty to act. It may, however, encourage the defendants to be truthful in their voluntary overtures to the public – a result that would advance the educational goal of the Labeling Act.

Finally, the arguments presented in favor of allowing Rose Cipollone's common law failure to warn claims apply with even greater force to her intentional tort claims. This Court recognizes a heightened presumption against preemption of state law intentional tort actions and has consistently been loathe to immunize intentional wrongdoers under the guise of federal preemption.[50] The Court's refusal to protect deliberate tortious conduct in federally-regulated fields is especially evident in its recent consideration of cases involving nuclear power. In *English*, for example, the Court

> recognize[d] that the claim for intentional infliction of emotional distress at issue here may have **some**

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[50] Thus, for example, common law actions for malicious libel are not preempted even in the heavily regulated field of labor relations. *Linn v. United Plant Guard Workers*, 383 U.S. 53, 63-64 (1966). For similar reasons, in the context of union activities governed by the NLRA, preemption does not operate to bar state law claims for intentional infliction of emotional distress through threats of violence, *Farmer v. United Brotherhood of C.&J. of America, Local 25*, 430 U.S. 290, 299-300 (1977), or claims involving misrepresentation, *Belknap v. Hale*, 463 U.S. 491, 511 (1983) (State has "substantial interest in protecting its citizens from misrepresentations that have caused them grievous harm", and that interest "clearly outweighs any possible interference with the [NLRB]'s function that may result from permitting the action for misrepresentation to proceed").

> effect on these decisions, because liability for claims like petitioner's will attach additional consequences to retaliatory conduct by employers. As employers find retaliation more costly, they will be forced to deal with complaints by whistleblowers by other means, including altering radiological safety policies. Nevertheless, we believe that this effect is neither direct nor substantial enough to place petitioner's claim in the pre-empted field.

110 S. Ct. at 2278 (emphasis added).

The argument in favor of permitting common law tort claims against tortfeasors is all the more compelling here, where Congress did not intend to regulate every aspect of smoking and health. It is illogical to read the Act's preemption provisions to preclude actions founded upon the intentional subversion of the Act's objective. As Minnesota's highest court observed in *Forster*, Pet. App. 178a, "[t]o find in this situation an implied preemption, we would have to assume that Congress intended the Act to be a license to lie, an assumption both uncharitable to Congress and violative of this state's deep concern for honesty as well as health."

## CONCLUSION

Wherefore, petitioner respectfully requests that the decision of the United States Court of Appeals for the Third Circuit be reversed and the case remanded for further proceedings.

Respectfully submitted,

*On the Brief*
MARC Z. EDELL
CYNTHIA A. WALTERS
HARRIET DINEGAR MILKS
MARY ELLEN MYERS

MARC Z. EDELL
*Counsel of Record*
BUDD LARNER
GROSS ROSENBAUM
GREENBERG & SADE, P.C.
*Attorneys for Petitioner*
150 John F. Kennedy Parkway
CN 1000
Short Hills, New Jersey 07078
(201) 379-4800

# APPENDIX

# INFORMATIONAL AID TO THE COURT FOR USE IN REVIEW OF THE JOINT APPENDIX*

**Thomas F. Ahrensfeld** – Philip Morris (1971- ). Vice President, General Counsel, Board of Directors Member. CTR Board of Directors Member.

**John R. Ave** – Loew's (1973- ). Vice President of Marketing, President and Chief Executive Officer. Tobacco Institute Communications Committee Chairman.

**James C. Bowling** – Philip Morris (1951- ). Director of Public Relations, Vice President, Director of Corporate Affairs. Tobacco Institute Communications Committee Member.

**Council for Tobacco Research** – U.S.A. (CTR) Established in 1954 as the Tobacco Industry Research Committee for the professed purpose of funding research relating to tobacco and health. Renamed Council for Tobacco Research – U.S.A. in 1964. Its members included American Tobacco, Brown & Williamson, Liggett (1964-1968), Lorillard, Philip Morris, R.J. Reynolds, United States Tobacco, and others. The chief executives of the member companies served on CTR's Executive Committee and later its Board of Directors, which set the organization's policy and budget. The organization employed a Scientific Advisory Board to review grant applications, recommend research projects, and oversee research conducted under CTR's auspices.

**High Cullman** – Philip Morris (1948-1988). Vice President and Vice Chairman.

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*Information contained herein was principally derived from discovery conducted in this case in the mid- to late 1980's.

**Joseph F. Cullman, III** – Philip Morris (1954- ).
Executive Vice President, President, Chairman of the Board, Chief Executive Officer, Chairman Emeritus of Board of Directors. CTR Board of Directors Member. Tobacco Institute Executive Committee Member.

**William U. Gardner, Ph.D.** – CTR (1971-1981).
Scientific Advisory Board, Scientific Director.

**Bowman Gray, Jr.** – R.J. Reynolds (1957-1967).
President, Chairman of Executive Committee. Tobacco Institute Board of Directors Member.

**Hill & Knowlton**
Retained by founding members of TIRC to give advice to the industry as to how it should respond to articles in the public press linking smoking and lung cancer. Hill & Knowlton recommended the formation of the TIRC and became public relations counsel to it and later to the TI upon its formation in 1958. Relationship with the cigarette industry terminated in the late 1960's.

**Robert C. Hockett** – CTR (1955- ).
Associate Scientific Director, Vice President, Research Director.

**Alexander Holtzman** – Philip Morris (1968- ).
General Counsel.

**Edward A. Horrigan, Jr.** – R.J. Reynolds (1978- ).
Executive Vice President, President, Chairman of the Board and Chief Executive Officer, Tobacco Institute Executive Committee Member.

**Curtis H. Judge** – Loew's (1968- ).
President, Chairman of the Board and Chief Executive Officer. CTR Board of Directors Member. Tobacco Institute Board of Directors Member.



**William Kloepfer, Jr.** – Tobacco Institute (1969- ).
Public Relations Counsel, Senior Vice President.

**Horace R. Kornegay** – Tobacco Institute (1969- ).
Vice President, President, Chairman.

**David C. Loomis** – Ted Bates & Co.
Account executive. Handled Tobacco Institute account in conjunction with Tiderock.

**James J. Morgan** – Philip Morris (1968-1982).
Vice President Brand Management, Executive Vice President Marketing.

**Frederick Panzer** – Tobacco Institute (1967- ).
Vice President Public Relations Vice President.

**Rosser Reeves** – Ted Bates & Co., Tiderock.
Chairman of the Board of Ted Bates. Left to form own public relations firm (Tiderock). Handled TI accounts.

**Alexander W. Spears** – Loew's (1965- ).
Research Chemist, Vice President Research & Development, Executive Vice President of Operations & Research. CTR Board of Directors Member.

**Arthur J. Stevens** – Loew's (1967- ).
General Counsel.

**Ted Bates & Co.**
Public Relations and advertising agency employed by various tobacco companies and the TI.

**Tiderock Corp.**
Public relations firm formed by Rosser Reeves in 1960's. Handled Tobacco Institute account.

**Tobacco Institute (TI)**
Trade association founded in 1958 to conduct lobbying and public relations efforts on behalf of its membership, which included Liggett, Philip Morris, Lorillard (except for the years 1968-1970), R.J. Reynolds and American Tobacco. The presidents and chief executive officers of the member companies served on the Executive Committee of the TI and dictated its policy. On a rotating basis, each of the members of the Executive Committee became its chairman and was designated to speak for the membership.

**Tobacco Industry Research Committee.**
See Council for Tobacco Research.

**Reginald B. Wells** – Tiderock Corp.
Executive Vice President, Public Relations.

**Addison Yeaman** – Brown & Williamson, and CTR (1937-1980).
General Counsel of Brown and Williamson, President of CTR.

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